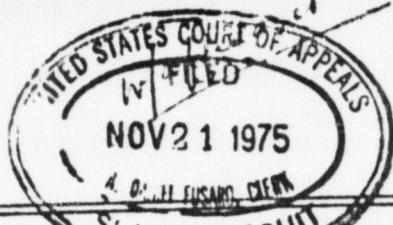


*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF



75-6068

To be argued by
WILLIAM ROCHE BRONNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal No. 75-6068

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION,
INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN
BROOK,

Plaintiffs-Appellants,

—against—

RUSSELL E. TRAIN, et al. ["Federal Defendants"],

Defendants-Appellees, and

HERITAGE HILLS OF WESTCHESTER, et al. ["Private Defendants"],

Intervenors.

Petition No. 75-4164

SUN ENTERPRISES LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION,
INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN
BROOK,

Petitioners,

—against—

ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, RUSSELL
E. TRAIN,

Respondent, and

HERITAGE HILLS OF WESTCHESTER, et al.,

Intervenors.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION TO REVIEW ORDER OF UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

**BRIEF FOR APPELLEES-RESPONDENTS, TRAIN, HANSLER,
MORTON, and THE UNITED STATES OF AMERICA**

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Appeal No. 75-6068

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND
GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD
E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,
Plaintiffs-Appellants,
—against—

RUSSELL E. TRAIN, et al. [“Federal Defendants”],
Defendants-Appellees, and

HERITAGE HILLS OF WESTCHESTER, et al.
[“Private Defendants”],
Intervenors.

Petition No. 75-4164

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND
GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD
E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,
Petitioners,
—against—

ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION
AGENCY, RUSSELL E. TRAIN,
Respondent, and

HERITAGE HILLS OF WESTCHESTER, et al.,
Intervenors.

**BRIEF FOR APPELLEES-RESPONDENTS, TRAIN,
HANSLER, MORTON, and THE UNITED STATES
OF AMERICA**

Issues Presented for Review

1. Should the petition be dismissed for untimeliness?
2. Did the District Court lack jurisdiction over an action to review issuance of a permit?
3. Were appellants in fact provided rights to be heard which fully comported with statutory and constitutional due process?
4. Was there proper consultation under the Coordination Act?
5. Does the permit in fact provide excellent protection for the environment?

Statement of the Case

These are two consolidated appeals. The first appeal is from an order and judgment of the Honorable Dudley B. Bonsal, United States District Judge, reported at 394 F. Supp. 211, dismissing on jurisdictional grounds an action against officials of the United States Environmental Protection Agency ("EPA") and the Department of the Interior ("Interior").* The action had challenged the validity of a permit issued to H & H Land Corp., a company in the Heritage Hills of Westchester organization (collectively, the "private defendants"), for discharge of sewage effluent. The second "appeal" is an original petition to review the final decision of EPA in issuing the same permit.

* District Court litigation continues between "appellants" and the "private defendants."

Statement of Facts

Issuance of the Permit

Pursuant to the National Pollutant Discharge Elimination System ("NPDES"), established by Section 1342 of the Federal Water Pollution Control Act Amendments of 1972 (the "1972 Water Act"), 33 U.S.C. §§ 1251-1376 (Supp. II, 1972), Region II of EPA received a permit application for a NPDES Permit to discharge pollutants from a sewage treatment plant into Brown Brook, in the Town of Somers, Westchester County, New York; the application was filed on behalf of the Heritage Hills of Westchester organization, a real estate developer, and was received on December 27, 1973 (Record of Proceedings before EPA ("Admin. record" at 1)). The application was incident to construction and operation of sewage treatment facilities for a condominium housing development then under construction. The permit application was given standard consideration for applications of such type; it was referred to the New York State Department of Environmental Conservation for review and certification of the effluent restrictions necessary to assure that the permittee's operation under the permit would comply with applicable state water quality standards. On April 29, 1974, after receipt of New York's certification, public notice of EPA's tentative determination to issue a permit was published in the Peekskill Star (19a),* a newspaper which circulates in the affected area but which is not the prime source of local news to the area's residents. The notice specified that a permit would be issued without a hearing unless there was a request for a hearing. Thereafter, on or about June 1, 1974, EPA

* References to pages prefaced by "A" are to the Appendix contained within appellants' brief; references to pages suffixed by "a" are to the federal appellees' appendix, reproduced with this brief. This Court previously allowed the parties to dispense with the printing of a separate appendix.

received a letter (A12) from petitioner-appellant ("appellant") Lyman Kipp which commented adversely on Heritage Hills' construction activities, and sought federal investigation, but which did not make reference to the pending permit application or request either a hearing or notice of any action by EPA. EPA reviewed all letters commenting on the proposed permit issuance or the New York State certification that the permit would conform with State water quality standards (A20), including Kipp's, and determined that they had already been adequately responded to by New York State officials (A 14, *et seq.*).

Kipp had previously been allowed to give testimony at a hearing on a New York State stream channelization permit issued in connection with the construction of the effluent treatment plant, and had unsuccessfully sought a hearing in connection with the state certification (see A1, A2, A12, A22-A23) at which to testify further on the same subjects.* EPA determined that Kipp's comments had already been adequately responded to by New York State in answering a parallel letter addressed to State officials (A14-A15, A16, A22-A28); EPA therefore sent no response to Kipp's letter. No request for a hearing having been received by EPA from any other party, and no federal or state agency having any objections, NPDES Permit No. NY0026891 (the "H&H permit") was issued on July 12 and was mailed to Heritage Hills on July 15, 1974.

The Permit's Restrictions

The permit (1a) generally includes extremely low levels for all categories of effluent limitations. It conforms with all statutory or regulatory-required limitations for biochemical oxygen demand ("BOD") (an index

* The propriety of New York State actions in connection with the permit involved here is not an issue on this appeal.

of the amount of oxygen removed by decaying organic matter in the effluent, and therefore withdrawn from use by fish and other fauna), suspended solids (*i.e.*, turbidity), fecal coliform (a measurement of the amount of potentially harmful bacteria present) and pH (a measurement of acidity-alkalinity). The permit includes further restrictions requiring the effluent to achieve daily arithmetic means for these various substances. A daily mean is substantially more stringent than the monthly mean generally included in NPDES permits, since it allows of practically no variation in output over time.

Furthermore, in order to satisfy the water quality standards of New York State, special restrictions have been written into the permit, in addition to those federally required. Despite the fact that the portion of Brown Brook into which the effluent discharges has been classified "class C (T)," the more severe standards for the lower part of the brook, which is a "class D" (*i.e.*, "intermittent") stream have been applied. Thus, the H&H effluent has been required to conform to intermittent stream standards. (A22). The permit drafters have thereby assumed that, at some periods, the H&H effluent will be the only fluid in the streambed, with no dilution to weaken any deleterious effects from the effluent on downstream biota. However, there will in fact generally be water in the stream, and resultant dilution. This dilution will be extra protection for the environment.

In addition, the limitations for "BOD" and suspended solids have been set at 5 milligrams per liter, considerably below the federal regulatory minimum of 30 milligrams per liter. The 5 mg./l. suspended solid limitation is an extra precaution not required by the State intermittent stream policy requirements.

Also, in order to attain the permit's low fecal coliform levels, the effluent is required to be thoroughly chlorinated. However, in order to prevent any damage from the chlorine, an extremely low chlorine limitation for the

effluent has been required; an even lower chlorine level has been required to be achieved in the receiving stream (20a). Since the stream has been deemed to be intermittent, these restrictions ensure that practically no chlorine will ever be present in the effluent.

There are also stringent limitations for oxygenation of the effluent so as to increase the amount of dissolved oxygen to be present in the effluent (and therefore available to fauna), and which prescribe the maximum amount of ammonia and phosphorous, in order to prevent the eutrophication which appellants so vocally fear. Settleable solids (*i.e.* silt) have also been tightly restricted.

Finally, there are elaborate self-monitoring, record keeping, and reporting conditions, structural fail-safe device requirements, and other provisions inserted in the permit to ensure that the H&H Corp. waste treatment facility will attain effluent limitations for its discharge that few plants, new or old, are ever required to attain, and that practically none but the most modern plants can hope to meet.

Appellants' Knowledge of the Issuance of the Permit

According to appellants (petition for review para. 14), Sun Enterprises and Kipp learned of the issuance of the permit during August, 1974, and received a copy of it through Kipp's then counsel on September 19, 1974; Southern New York Fish and Game Association, Inc. and Homan learned of it by October, 1974. Thus, Sun and Kipp learned of the permit well within 90 days of its issuance, while Southern N.Y. and Homan learned of it approximately 90 days after its issuance.

No legal action to review the permit was initiated until January 8, 1975, more than 90 days after Sun and Kipp had received notice, and approximately 90 days after Southern N.Y. and Homan had received notice; this was 6 months after the permit had been issued. The

action taken was a suit in the District Court; that Court (Honorable Dudley B. Bonsal) held on May 9, 1975, that it lacked jurisdiction over this claim and that a NPDES permit must be reviewed, if at all, on a direct petition to the Court of Appeals. On July 31, 1975, almost a year after the permit had been issued, appellants filed the present petition for review, which has been consolidated with an appeal from Judge Bonsal's decision.

ARGUMENT

POINT I

Appellants have Disregarded the Proper Procedures for Review of Issuance of a NPDES Permit.

A. This petition is time-barred.¹

Section 509(b)(1) of the Water Act, 33 U.S.C. § 1369(b)(1) (1972), is a statute of limitations and divests the Court of Appeals of jurisdiction unless the petition is timely filed. *Peabody Coal v. Train*, 518 F.2d 940 (6th Cir. 1975); *see also Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 659 (D.C. Cir. 1975) ("Oljato"). Timeliness consists in filing the petition within 90 days of the issuance of the permit complained of, unless the petition is based solely on grounds which arose more than 90 days after issuance of the permit. In this regard the statute resembles various other statutes setting short limitations periods for Court of Appeals review of final agency action. *See Oljato, supra*, 515 F.2d at 695 n. 6; *see also Associated Industries of N.Y. State, Inc. v. United States Dept. of Labor*, 487 F.2d 342, 345 n. 1 (2d Cir. 1973).

¹ Appellees' motion to dismiss the petition as untimely was denied by this Court without prejudice to renewal at the present time.

Section 1369(b)(1) (1972) is clearly a statute of limitations in the traditional sense. The section, as first drafted by the Senate Committee on Public Works, provided for review in the Court of Appeals within 30 days of the issuance of the permit. Senate Report (Public Works Committee) No. 92-414, October 28, 1971 [to accompany S. 2770], 1972 U.S. Code Cong. & Admin. News 3668, 3751. In this it followed the review provisions of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857, which was the major procedural model for the Water Act draftsmen. It passed the Senate in this form. Section 1369(b) as amended by the House of Representatives provided for judicial review of administrative grants of permits in "the district court of the United States for the district in which the person resides or transacts business," also within 30 days of issuance. House Report (Public Works Committee) No. 92-911, March 11, 1972 [to accompany H.R. 11896] (U.S. Govt. Printing Office), at 58. Such district court review would necessarily entail further review by a court of appeals before final determination of the validity of any NPDES permit.

The language directing review to the courts of appeals was reinstated in the statute as enacted when the Senate Conference Committee substitute was adopted in preference to the House bill. Senate Conference Report No. 92-1236, September 28, 1972 [to accompany S. 2270], 1972 U.S. Code Cong. & Admin. News 3776, 3825 (the "Conference Report"). The Conference Report, explaining the steps taken to resolve the differences between the Senate and House versions, documents the evident compromise which was achieved: the court of appeals review procedure was retained, but the limitation period was extended by 60 days, to provide 90 days after issuance of a permit for a petition for review. *See* the Conference Report, 1972 U.S. Code Cong. & Admin. News at 3825.

It is clear from this history that the 90 day period eventually adopted was intended to be an outer limit to be strictly enforced. In addition, review of the statute as a whole leads to the conclusion that the Congress, after having provided elaborate administrative due process requirements before a permit could be issued, was determined that a permit would be a vehicle for enforcement and regulation, not dilatory litigation such as that involved here.² As was stated in *Peabody Coal v. Train*, *supra*, 518 F.2d at 942-943:

The legislative history of this Act shows that Congress desired a clear and prompt time schedule for applications for judicial review. . . .

We believe the sense of urgency concerning environmental protection portrayed in the Act we now construe was equally present in the Clean Air Act, *See* 42 U.S.C. §§ 1857 and 1857h-5(b)(1) (1970), and that cases enforcing the statutory time limits contained therein are precedent for our present decision. *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974). *See also Union Electric Co. v. EPA*, [515 F.2d 206 (8th Cir. 1975)]; *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

The court then dismissed a petition filed 92 days after the action sought to be reviewed.³

² The drafters of the Water Act explicitly eliminated any requirement for a "NEPA" study before issuance of a permit, 33 U.S.C. § 1371. Furthermore, they drafted several provisions, such as 33 U.S.C. § 1342(d)(2), which give the Administrator of EPA a veto which will be lost if not utilized within a short time period. The consistent thread in these various provisions is the determination to eliminate anything which would result in excessive or unpredictable delay in permit issuance.

³ Appellants' claim to the contrary notwithstanding, *Peabody* [Footnote continued on following page]

The present petition, recognizing its obvious tardiness, states that it is in fact based solely on grounds which arose more than 90 days after the date of issuance. However, the various grounds alleged in the petition were known to appellants within 90 days of issuance of the permit, and on most grounds before the issuance of the permit.

Appellants' first "new" ground is the alleged wrongful failure by EPA to give them notice of its proposal to issue the permit and consequent loss of an opportunity for a hearing before EPA prior to issuance.⁴ However, two appellees had actual notice, and all appellees are therefore charged with knowledge of this fact as of August or September of 1974, within 90 days after issuance of the permit. It was approximately a year later when they first sought to petition this Court.

Appellants also imply that their delay is excused by the fact that they only learned of the existence of an alleged failure—by the Department of the Interior, not EPA—to fulfill its obligation of consultation under the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.* (the "Coordination Act"), when the District Court action was begun. Even assuming that EPA had an obligation to enforce the statute against a reluctant Department of the Interior,⁵ this is not a ground arising more than 90 days after the permit issuance. Interior's "no comment" response, dated May 19, 1974, was a part of the administrative record (A17) and was available for appellants' inspection at any time.

Coal v. Train is directly on point. In fact, since a state-wide plan rather than a single permit was involved in *Peabody*, there were greater equitable reasons for the retention of jurisdiction to review the propriety of the administrative action.

⁴ We discuss the merits of this issue in Point II, *infra*.

⁵ This issue is discussed in Point III, *infra*.

Another allegedly new ground for review, the alleged violation of EPA wetland regulations, depends upon interpretation of pre-existing laws which must be deemed to have been known to appellants when their counsel first received word of the permit's issuance.

Finally, what appears to be appellants' prime contention in their petition, that EPA failed to consider the impact of the permitted discharge on the waters and wetlands downstream of the effluent point in its evaluation of the permit application, is not a newly arising ground for review. Appellants, as riparian owners and conservationists, claim that operations under the permit will violate the requirements of the Water Act, with resultant environmental degradation. But the alleged effect of Heritage Hills' operation was wholly predictable and was in fact brought to EPA's attention by appellant Kipp over a year ago. Appellants themselves admit that this alleged degradation was anticipated by them on April 5, 1974 (petition for review para. 25). It would wholly defeat the purpose of the statute to accept the bold proposition that grounds to contest a NPDES permit "arise" only after the permittee begins to discharge effluent pursuant to the permit. The untenable corollary would be that many NPDES permits could not be reviewed until months or years after their issuance. This would run directly counter to the Congressional intent in enacting this section. *Cf. Union Electric Co. v. EPA*, 515 F.2d 206, 219-220 (8th Cir. 1975).

The congressional intent in this provision was to prevent environmental degradation caused by rigid adherence to outmoded theories in the face of new scientific or other information. The Congress was attempting to avoid freezing of administrative action which, although based on the best knowledge available at the time, was subsequently determined to be erroneous on the basis of

information derived from further scientific advances. Furtherance of the Water Act's goals would then require review of the previous determination, either by EPA, or by the Court if EPA should refuse. As the Eighth Circuit stated with respect to the closely analogous provision in Section 307(b)(1) of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-5(b)(1):

We believe that the significant new information to which Congress referred must relate to the protection of the public health or environmental quality . . . *Union Electric Co. v. EPA, supra*, 515 F.2d at 219.

New grounds must first be brought to the attention of the Administrator of EPA. Only if he refuses to act on that new evidence can review be sought in the Court of Appeals, and that review would be of his refusal to act on the basis of the new information, not of the propriety of the original determination on the original record. Presentation of the "new grounds" to the appellate court in the first instance would require it to act without a reviewable record and to compel it to engage in fact-finding for which it is not equipped. *Union Electric Co. v. EPA, supra*, 515 F.2d at 220; *Oljato, supra*, 515 F.2d at 659 *ff.*

No formal notice was ever given to EPA of any "new" grounds for reconsideration of its action in issuing a permit. *Oljato, supra*, 515 F.2d 667. All that occurred was an informal query through counsel asking whether EPA would voluntarily accept a remand for the purpose of conducting the hearing which had not been held prior to issuance of the permit. EPA declined to do so in the absence of the consent of all parties, and the permittee declined to consent. The District Court litigation was not "notice"; rather, it was a deliberately chosen and clear alternative to the inception of new administrative pro-

ceedings by the giving of notice. Appellants' failure to present their alleged new grounds to EPA precludes them from raising these grounds at this time.

The statute of limitations requires any petition filed more than 90 days after issuance of a permit to be based solely upon grounds arising within 90 days of issuance. All of the allegedly "new" grounds predate the permit.⁶ Moreover, appellants have failed to make the administrative record required for review of the refusal to consider allegedly new grounds. The petition must therefore be dismissed.⁷

⁶ If this Court should find that one ground for review of the permit's issuance is "new" and should also find that it was properly presented to the Administrator and that a remand is required for proper consideration of the issue, the Court should still affirm EPA's right to disregard the "old" grounds on remand, irrespective of whether they had previously been presented to EPA. To do otherwise would be to ignore the restriction placed by the use of the word, "solely," in the statute.

⁷ All of the grounds for review of the issuance of the permit alleged in the petition were presented to the District Court in an unsuccessful attempt to invoke its jurisdiction begun in January of 1975. Appellants deliberately refrained from filing the present petition until after completion of their District Court litigation. Thus, the period of time within which the statutorily prescribed review procedure was deliberately ignored amounts to more than nine months over and beyond the expiration date of the statute of limitations. The private defendants, who have expended large sums of money in reliance upon the permit, are obviously prejudiced by this delay. The Congressional intent is also frustrated, because the national interest in immediate determination of issues involving environmental quality has been obstructed. Therefore, assuming that the statute of limitations is for some reason ruled inapplicable, the petition is still dismissible because of appellants' laches. *But see A56-A57.*

This is not a case in which the plaintiffs failed to bring suit for an injunction against construction (which had not yet begun); rather, appellants deliberately invoked the wrong Court's jurisdiction, in the teeth of defendants' assertion of exclusive jurisdiction in the Court of Appeals, while construction was underway. *Contrast Steubing v. Brinegar*, 511 F.2d 489 (2d Cir. 1975).

B. The District Court correctly ruled that it lacked jurisdiction

Section 509 of the Water Act, 33 U.S.C. § 1369 (1972), provides for original review in the Court of Appeals of EPA's action in issuing a NPDES permit.

Appellants contend that the Water Act establishes concurrent jurisdiction in the District Court, and have also cited several other statutes as laying jurisdiction there. All of these arguments were presented to and rejected by the District Court. That Court noted that there is a strong presumption against the availability of simultaneous review in the district and appellate courts; the Court also observed that there is no section of the Water Act which could be said to establish district court jurisdiction. Finally, the Court examined each of the purported bases of jurisdiction and found each lacking. In all these determinations the District Court was eminently correct, and should be affirmed.

It is well-established that, where Congress has specifically designated the Court of Appeals for judicial review of administrative action, absent extraordinary conditions,⁸ that forum is exclusive. *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1304-1305 (10th Cir. 1973); *Oljato, supra*, 515 F.2d at 660. Thus, the establishment of a direct appellate judicial review section in the Water Act is sufficient Congressional action to oust otherwise allegedly existing general equity, mandamus, or federal question jurisdiction of the District Court.

The reservation of rights to litigants granted elsewhere in Section 505(c), 33 U.S.C. § 1365(e) (1972), does not affect this result. That subsection merely pro-

⁸ The running of the limitations period could not itself be such an "extraordinary condition" without undermining the conceptual validity of any statute of limitations.

vides that the rights in Section 505 are in addition to and not in replacement of rights granted in other statutes or at common law. But Section 505 is entitled, and deals only with, citizen suits. It allows suits against persons or agencies, *other than EPA*, which are in violation of an effluent standard or limitation or an order in respect thereto. It also allows suits against the Administrator of EPA for failure to perform a nondiscretionary duty. There is no equivalent reservation of rights in Section 509. *See generally Natural Resources Defense Council, Inc. v. Callaway*, — F.2d —, — E.L.R. —, 8 E.R.C. 1273, 1276 (Dkt. No. 75-7048) (2d Cir. Sept. 9, 1975); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 698-703 (D.C. Cir. 1975). Inasmuch as no citizen suit jurisdiction against EPA ever existed in the District Court under 33 U.S.C. § 1365(a) (1972), neither that section nor the savings clause of Section 1365(e) provides a jurisdictional basis for the District Court action.

Plainly, since this is a suit against EPA, the existence of an "effluent standard or limitation" or order, whether violated or not, is of no benefit to appellants.⁹ If appellants are seeking review of EPA's action in approving or promulgating any alleged effluent limitations, 33 U.S.C. § 1369(b)(1)(B) (1972) designates the Court of Appeals as the appropriate reviewing forum, and appellants are met with the same statute of limitations that they already face.

On the other hand, if appellants are alleging that the Administrator failed to perform a nondiscretionary duty, the only duties involved here are in connection with the

⁹ As the District Court noted, the only effluent limitations alleged in the amended complaint to have been violated by the private appellants, not EPA, are those in the permit itself. Appendix at A37-A38. These would be reviewable in any event on review of the permit in the Court of Appeals, had the petition been timely.

issuance of the NPDES permit.¹⁰ These duties, the setting of effluent limitations, the requesting and receiving of state certification and Interior and Corps of Engineers consultation, the publishing of notices, and the reviewing of comments, were performed. This is not a failure to act, but affirmative action. And it is action which the statute specifically provides may only be challenged in the Court of Appeals. *See Oljato, supra*, 515 F.2d at 659.

Appellants allege an alternative statutory basis for District Court subject matter jurisdiction in the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (the "APA"). Even assuming that the APA is an independent source of district court jurisdiction to review the actions of administrative agencies, *but see Aguayo v. Richardson*, 473 F.2d 1092, 1101-1102 (2d Cir. 1973), *cert. denied*, 414 U.S. 146 (1974), it does not apply to the actions sought to be reviewed herein. Section 10(c) of the APA, 5 U.S.C. § 704, indicates when an agency action is reviewable in the district court:

Agency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review. (emphasis supplied).

Therefore, before the APA can become an independent basis of jurisdiction to review EPA's issuance of the H&H permit, there must be "no other adequate remedy in a court." Since Section 509 of the Water Act, 33 U.S.C. 1369(b)(1) (1972), provides an adequate exclusive remedy by review in the Court of Appeals, APA jurisdiction remains dormant. *See Oljato, supra*, 515 F.2d at 663.¹¹

¹⁰ Alleged failures to perform these duties properly are discussed *infra*.

¹¹ Alleged jurisdiction directly under the Coordination Act or under EPA's wetlands regulations are discussed, respectively, in Points III and IV.

There is no presumption in favor of federal jurisdiction. *Preston v. Purtell*, 410 F.2d 234 (7th Cir. 1969). Appellants have clearly failed to meet their burden of demonstrating the existence of district court jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

POINT II

The Requirements of Due Process Have Been Satisfied.

Appellants claim that EPA wrongfully ignored their request for notice of its intent to issue a permit, and also that EPA's method of giving published notice worked to their prejudice. Specifically, they charge that the selection by EPA of a newspaper with a relatively "thin" circulation in Somers for publication of EPA's notice of intent to issue a permit prevented them from making a timely response. This is claimed to have violated EPA's own regulations, the statute, and appellants' constitutional rights to due process, and to have rendered the permit as issued void. Appellants are in error; notice was quite adequate. In any event, the remedy sought is grossly excessive.¹²

The short answer to the claim that their request for notice was ignored is that the document they refer to as a request for notice in fact was not such. The May 28 letter from Kipp to EPA contained general comments,

¹² We are advised that the private appellees will discuss the significance of the fact that the appellants litigated many if not all of the substantive issues now sought to be raised in a hearing before EPA in previous New York State administrative hearings. We will therefore not address this issue here, so as to avoid duplication. Our failure to address the issue, however, should not be deemed a waiver or denigration of the significance of the point.

and generated an internal memorandum (A.15) on the question of whether or not to reply. But it contained no specific request for notice, nor grounds to infer one.

A. There was no violation of Constitutional due process

Schroeder v. City of New York, 371 U.S. 208 (1962), relied upon by appellants, generally explains the Constitutional due process requirements regarding the giving of notice of imminent governmental action:

Notice by publication is not enough with respect to a person whose name and address are *known or very easily ascertainable* and whose legally protected interests are *directly* affected by the proceedings in question. *Id.* at 212-213 (emphasis supplied).

Two questions must therefore be answered: first, as to each appellant, whether he or it is a "person" whose name and address are known or very easily ascertainable, and second, whether the interests of any such ascertainable persons are *directly* affected.

Appellant Homan is a tenant of Kipp's who, along with the other members of appellant Southern New York Fish and Game Association, is allowed by Kipp or Sun to enter on the allegedly affected property. We submit that their "interests" are sufficiently intangible to be extremely difficult of ascertainment. "Appellants" Brown Brook and No Bottom Marsh are not legal entities and are therefore not "persons." Published notice is therefore constitutionally sufficient for these four appellants.

As regards appellant Kipp, his interest is essentially as president of appellant Sun Enterprises, Ltd., and is therefore subsumed in Sun's interest. Sun itself is one of the landlords in the vicinity of the private appellees' property. The size of that property is large; the record is devoid of information regarding either the number of

contiguous landowners to the private appellants' property, or the number of riparian owners of land on or abutting Brown Brook downstream of that property.

In *Schroeder v. City of New York, supra*, the Supreme Court required New York City to make some attempt to give riparian owners actual notice, beyond mere publication and posting of notice, before it could acquire certain waters as part of its municipal water supply. However, Schroeder's interest was much more easily identifiable than is Sun's—Schroeder was a riparian owner of property on the Neversink, a major river, which acts as a property divider. Brown Brook, on the other hand, is so small as to be unidentifiable at points on Sun's land (Cardenas affidavit of 2/23/75 (in opposition to summary judgment motion, etc.) para. 3C.). Furthermore, the record in *Schroeder* apparently demonstrated that tax and deed records contained all information necessary to discover the identities and locations of all the interested parties, while the present record is devoid of any indication of the nature of local property records and the difficulty in determining from those records the land which is in fact riparian land. It simply cannot be stated that Sun's identity was easily ascertainable.¹³

¹³ Sun may claim that it was in fact easily identifiable, because of the correspondence by Kipp to EPA and New York State. However, this does not detract from the argument that the class of persons of which Sun was one is not sufficiently easily identifiable for due process to require actual notice to the class. And there was no reason to treat those who had previously expressed views to EPA differently from those who had not. Rather, absent an affirmative request for notice (which EPA was by regulation obligated to grant), it was reasonable to presume that persons expressing written views without requesting notice of the opportunity for a hearing were writing in lieu of testifying. The regulations in force at the time allowed a choice between submitting written comments or requesting a hearing. See 38 Fed. Reg. 13528 13536 (May 22, 1973), 40 C.F.R. 125.32(b)(1) (July 1, 1974). See also fn. 14 at 22, *infra*. This was the presumption which was actually made with respect to Kipp and Sun (see A16, *see also* 19a).

Nevertheless, assuming (but not conceding) that Sun or Kipp is easily ascertainable, the question remains whether their interests are *directly* affected. Schroeder herself was directly affected because she and her neighbors were to have their water supply reduced in what is a water-poor area, thereby possibly limiting the potential alternate uses of their property. They were to be made subject to tampering with the Neversink in a way which might substantially erode its water quality. And what must have been the single most important feature in making their property valuable—a full, free-flowing river—was to be reduced or eliminated. Thus, there was what amounted to a municipal condemnation of a legally-recognized interest in land.

Sun has suffered no such loss. The only claimed loss is that, over a long time, private action under public regulation might allow eutrofication to set in, or Sun's aquifer to be contaminated, or to be generally thought to be contaminated, with resultant restrictions in the possible use and diminution of the value of the Sun land. There has been no estimate even by appellants' professional affiants regarding the amount of time required for the anticipated degradation to set in, and in fact it appears to be beyond present scientific capabilities to determine this issue with any precision. Sun's alleged impending damages are obviously speculative, and may be minimized by the time Sun is ready to develop its land by (1) failure of the threatened physical harm to materialize, (2) recovery of compensatory damages in a state-court litigation between the private parties, or (3) increased public knowledge regarding the reliability and efficiency of a modern treatment plant such as that of the private appellees.

The federal action herein is the issuance of one of literally dozens of permits required to allow construction and operation of a vast condominium development, and

was never intended to be a vehicle for review of the propriety of that entire project (*see, e.g.*, affidavit of Nicholas Robinson, November 13, 1975, para. 25). The permit was merely to allow certain highly purified effluent to enter into a particular streambed at a particular point, as opposed to an alternative discharge point, or discharge into a neighboring stream, or discharge after somewhat more, less, or different treatment of the effluent. The purpose of the notice was *not* to advise owners that their property interests were being affected and that they might obtain compensation if a timely petition was filed, as in *Schroeder*. In fact, the permit explicitly avoids affecting private riparian rights (6a). Rather, notice was merely to obtain the comments of the local environmentally-interested persons.

In short, the effect of the permit on Sun's interest is anything but "direct." It is, if not actually remote, at least sufficiently indirect so that an attempt at actual notice is not constitutionally required.

B. EPA's notice satisfied both the statute and EPA regulations.

As appellants note, the Water Act merely provides that notice of some sort of the opportunity for a public hearing prior to issuance of a NPDES permit must be given, and directs EPA to prescribe the particular form of notice required. EPA's regulations, insofar as is relevant, require publication

in local newspapers and periodicals, or if appropriate, in a daily newspaper of general circulation, except that public notice of hearings shall be published in at least one newspaper of general circulation within the geographical area of the discharge . . .¹⁴

¹⁴ 40 C.F.R. § 125.32 (July 1, 1974). The regulations in force on April 29, 1974, when the notice was actually given, are found [Footnote continued on following page]

Appellants' claim that it was impermissible to utilize a daily newspaper with a reported circulation of 67 (their figure) instead of other newspapers with higher circulation figures founders on a misunderstanding of the significance of the term, "general circulation."¹⁵ Appellants seem to believe that the term means the newspaper with greatest circulation on the affected area, or else the "official" newspaper. It means nothing of the sort. Rather, "general circulation" merely means

"a publication containing matters of general public interest as distinguished from trade journals catering to a special class of people . . ."

Barrett v. Cuskelly, 275 N.Y.S. 2d 280, 284, 52 Misc. 2d 250 (Sup. Ct. N.Y. 1966), *affd.*, 279 N.Y. Supp. 2d 380, 28 App. Div. 2d 532 (2nd Dept. 1967). In the circum-

at 38 Fed. Reg. 13536 (May 22, 1973); these are in all material respects identical. Appellants' paraphrase of the regulations (brief at 22) is inaccurate in the transposition of "the" for "a" and in interpolation of the word, "local," in their phrase, "publication in the local newspaper of general circulation." The regulations are correctly quoted in the legal addendum to their brief (brief at 65-66). On July 24, 1974, the regulations were amended without changing the notice provisions but to provide that all persons commenting on the draft permit would receive a copy of the final permit and notice of the opportunity for a hearing. 39 Fed. Reg. 27081. This change was dictated by changes in the adjudicatory hearing procedure. Inasmuch as Kipp did not comment on the draft permit, even under these new regulations he would not have been entitled to a copy of the final permit.

¹⁵ Appellants' contention (brief at 12-13), that the record does not establish that any notice was given misreads both the record and the applicable law. First, it was incumbent upon appellants as challengers of agency action to prove that notice was not given. Second, the federal appellees submitted two affidavits clearly stating that notice was given. We possess and are prepared to hand up at argument a copy of the relevant issue of the newspaper, with the printed notice appearing inside.

stances of the case, notice was properly published. *Bankers Trust Co. v. Terll*, 231 N.Y.S. 2d 374, 376, 35 Misc. 2d 835 (Sup. Ct. N.Y. 1962); *Gampel v. Burlington Industries, Inc.*, 252 N.Y.S. 2d 500, 43 Misc. 2d 820 (Sup. Ct. N.Y. 1964).¹⁶

In any event, appellants did receive actual notice of the issuance of the permit before the running of the statute. Even if appellants had been precluded from requesting a pre-issuance hearing, they have not sought a post-issuance hearing to present what are now alleged to be "new" grounds for revision or revocation of the permit. They therefore cannot justify an injunction voiding the permit.

POINT III

There has been no failure to consult the Department of the Interior.

Appellants claim that EPA and Interior have failed to undertake a mandated duty of consultation under the Fish and Wildlife Coordination Act, and that this alleged violation requires nullification of the permit and a remand for proper consultation. In fact, there was no such failure and there should be no such consequences.

The uncontested facts demonstrate that E.P.A. did, in accordance with its routine practice, mail a copy of the proposed permit to the appropriate Interior office. However, Interior merely acknowledged receipt, and did not make any substantive evaluation of the permit. The

¹⁶ Appellants' contention that the failure to follow the alleged mandates of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.*, was also a violation of due process, is responded to in Point III, *infra*. Their contention that EPA's alleged failure to follow its wetlands regulations violates due process is responded to in Point IV, *infra*.

District Court held that this nevertheless satisfied the requirement of the Coordination Act. However, even if it did not, the Act gives appellants no private right of action within which to obtain review of the alleged non-compliance.¹⁷ Furthermore, even if there is a private right of action, it does not reach the specific wrong alleged herein. Finally, even if the sanction of voiding the permit and remanding to EPA were otherwise applicable, it is a discretionary remedy. The constraints under which the agencies involved are operating, and the well-founded reliance of the private appellees upon the validity of the permit, preclude the granting of any injunctive relief here.

A. The requirements of the Coordination Act have been satisfied.

The intent of Congress in enacting the Coordination Act was primarily to provide for review of "water resources development" projects with regard to environmental interests. The projects expected to be affected by the statute were watershed protection, flood prevention, navigation improvement, coastline land reclamation (filling), and hydro-electric power development projects of the Bureau of Reclamation, the Federal Power Commission, the Coast Guard and the Corps of Engineers. Senate Report No. 1981, July 28, 1958 [to accompany H.R. 13138], 1958 U.S. Code Cong. & Admin. News 3446 *et seq.* The value of the procedure established by the statute was seen in its generation of an impetus in the water resources development agencies to balance developmental with environmental concerns in their decision-making process. The reviewing agencies, presently the

¹⁷ Since the District Court held that this Court was the proper forum for resolution of Coordination Act questions arising in a Water Act context, it did not make any finding concerning whether or not appellants otherwise had a private cause of action under the statute.

Department of the Interior, the National Oceanic and Atmospheric Administration, and various state agencies, were not given a veto power over the other agencies' projects, although subsequent case law has established the standing of *Interior* to contend that its views had improperly been refused any consideration.

The thrust of the Coordination Act is toward the other agencies, not Interior itself. The Act gives Interior the opportunity to act as "spokesman for the environment." If Interior should determine that a particular program was imbued with sufficient internal environmental protections, then it is well within Interior's competence to defer to the other agency having primary responsibility for the program.¹⁸ Interior is in the process of issuing regulations formalizing this position as regards NPDES permits. It has published a "Notice of Proposed Adoption of Guidelines for Review of Fish and Wildlife Aspects of Proposals in or Affecting Navigable Waters," in the Federal Register on August 15, 1974 (39 Fed. Reg. 29552), which establishes interim guidelines for selection of those proposed permits which will receive in-depth consideration, pending promulgation of final regulations.

Interior's position on this issue, that it is not obligated to make an affirmative response, is supported by the meaning of the word, "consult," in ordinary speech. Generally there are two meanings of this word, the first being "to apply to for direction or information; to ask the advice of—as to consult a lawyer." The second meaning is "to deliberate together, to confer." Webster's *Third New International Dictionary* (1968); *Garman v. Metropolitan Life Ins. Co.*, 175 F.2d 24, 27-28 (3rd Cir. 1949); *C.I.R. v. John A. Wathen Distillery Co.*, 147 F.2d 998,

¹⁸ There is nothing in the *Water Act* to prohibit the waiver by Interior of its right to express its views within a reasonable amount of time.

1001 (6th Cir. 1945), *cert. denied*, 325 U.S. 883; *see also* *Tepplitsky v. City of New York*, 133 N.Y. Supp. 2d 260, 261 (Sup. Ct. Kings 1954). The definition invariably placed first, and thereby given implied preference, has been the use of the term to connote a unilateral rather than a bilateral activity.

Appellants do not contend that plenary review of each permit referral is necessary (brief at 36). They therefore necessarily admit that a more summary review of some would be a proper minimum under the statute. In this position they apparently follow the District Court, which stated:

implicit in the absence of such mandatory language is a grant of discretion to Interior as to how best to utilize its personnel and resources to achieve the Act's purposes of fish and wildlife conservation.

* (A42-A43)

However, they then claim that the lack of *any* review of the instant permit is beyond the bounds of any proper exercise of discretion.

It is true that there has been an ongoing controversy between certain Congressmen and the agencies involved over the proper funding levels for NPDES permit review.¹⁹ But it is significant that the Congressional comments explicitly recognize the possibility of a waiver by Interior of its right to comment under the Coordination Act. Hearings before the Conservation and Natural Resources Subcommittee of the Committee on Government Operations, House of Representatives, 93rd Cong., 2d Sess., May 25, 1973, Appendix 4, Part C, Correspondence Re: Applicability of Fish and Wildlife Coordina-

¹⁹ We address this subject at Point III-C, *infra*.

tion Act, etc., at 1348 ("Applicability Hearings").²⁰ And Congressional acquiescence in the establishment of a "no comment" response category, even as an interim measure, strongly implies Congressional recognition (by the drafters of the relevant provisions of the 1972 Water Act) that Interior's inaction would not be contrary to law or create a clear and present danger to the environment.

In any event, the accedence of Interior to Congressional requests for program changes, at a point in time after the issuance of the "no comment" response to the instant permit referral, would be no evidence of the invalidity of such a response. The decision to re-allocate funds in subsequent years so that analyses, whether perfunctory, rudimentary, or substantial, could be made of future permit referrals, cannot be construed as a concession by Interior that the statute mandates any particular amount of attention in order for there to have been proper "consultation."²¹

Appellants have contended below, and may be contending on appeal, that the rendering of substantive comments by Interior is a "nondiscretionary act" as to which they should have been allowed to sue to obtain performance

²⁰ A printed copy of these hearings was handed up to the Court by counsel to the federal defendants at argument before the District Court, but was not made part of the record on appeal. That copy will be transmitted to the Court for inclusion in the record upon the filing of this brief.

²¹ Appellants contend additionally that EPA's failure to advise Interior that a trout stream and wetlands were involved precluded the informed exercise of discretion by Interior. But the proposed permit required the permittee to achieve New York State water quality standards for intermittent streams, which are in the stream category involving the most stringent of the stream standards established by New York State. And Interior can be presumed to be able to consult the topographical maps and stream indices for the geographical area in which the permitted activities were to take place, and to observe the wetlands notations which exist on such maps pursuant to previous topological surveys. Finally, had Interior examined the permit's provisions, it would have discovered that it contains more than adequate protections for trout and wetlands.

under Section 505 of the 1972 Water Act, *supra*, 33 U.S.C. § 1365. This argument founders on a misreading of this section, which actually provides:

... any citizen may commence a civil action on his own behalf . . . (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . [60 days after notice has been given] (emphasis supplied)

The alleged nondiscretionary act which was not performed herein is not one allegedly enjoined upon the Administrator (of EPA), but rather upon Interior. The Water Act speaks of "nondiscretionary acts" solely in terms of acts required of EPA.

B. The Coordination Act gives no private right of action.

The Coordination Act includes no express grant of jurisdiction to private citizens to sue "on Interior's behalf." While the statute is frequently invoked in connection with private suits under the National Environmental Policy Act, 42 U.S.C. § 4321 ("NEPA"), there is to our knowledge no case where it has been specifically held to be an independent jurisdictional basis for private litigation. Its entire tenor is precatory, not mandatory. *See* Guilbert, "Wildlife Preservation Under Federal Law," in E.L.I. (ed.), *Federal Environmental Law* 556 (1974). It does not establish a private right of action. *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 754 (E.D. Ark. 1971).

Thus *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971), and other cases relied upon by appellants

merely document the fact that as to certain projects, unsuccessfully challenged by private litigants, there *had* been exchange of views under the Coordination Act between the primary agencies and Interior.

It is assumed for the purposes of this argument that the Coordination Act necessarily includes within it sufficient grant of jurisdiction to Interior to sue to effectuate its essential purposes. But the legislative intent as manifested in the Coordination Act is to view the grant of jurisdiction as extending solely to Interior itself, which is best situated to determine whether or not its interests are being violated. *See Udall v. Federal Power Commission*, 387 U.S. 428 (1967). But if the right lies solely with Interior, then Interior can waive the right. For example, Interior could in a proper situation be prevented by its own delay from having its views considered. *Udall v. Federal Power Commission, supra*, 387 U.S. at 452-453 n.4 (Harlan, J., dissenting). There can never be a more explicit waiver than has occurred here. Appellants can have no standing to assert the necessity for Interior review when Interior has declined to exercise its right of review.²²

Even if the Coordination Act can be invoked by private litigants, it was never intended to grant jurisdiction to disrupt the pro-environmental action of EPA under the Water Act, particularly not on the scale which would eventuate under appellants' theory. *Contrast NEPA*. The inevitable effect of a "voiding" of one EPA permit because of an alleged Interior omission would be disastrous, since almost all of the tens of thousands of NPDES permits which are outstanding were issued in good faith

²² *Akers v. Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972), also relied upon by appellants, merely involved consultation by an agency of Interior and failure to listen to Interior's response; *Id.* at 1379. It is merely a case following the rule of *Udall v. Federal Power Commission, supra*.

without substantive comments from Interior (see A41-A42). Absent an explicit grant of jurisdiction in the Coordination Act, the public policy must be presumed to be against disruption of this entire program.

C. Assuming that the Coordination Act allows a private cause of action, the facts of this case do not make out an actionable wrong.

Appellants seek an order disapproving the permit and remanding the matter to EPA and Interior for additional consultation. Even assuming that the Coordination Act grants private parties the right to sue for this relief in appropriate circumstances, the lack of any demonstrable prejudice to the environment from the procedures utilized precludes relief. It would be completely inconsistent with the intent of the Coordination Act to mandate "consultation" where it was unnecessary and would serve no purpose.

The stated ground for Interior's determination to take no action was "lack of personnel." However, lack of personnel implies commitment of available personnel elsewhere, and therefore indicates a value judgment as to the relative importance of action by Interior in NPDES permit as opposed to other consultation situations.

The Department of the Interior possesses less expertise and fewer resources to review NPDES permits than either EPA or New York State's Department of Environmental Conservation. *See* Applicability Hearings, *supra*, at 1350. Interior is of course aware of the EPA mandate to protect the environment, and the certification requirements which insure state involvement in any NPDES permit, 33 U.S.C. § 1341 (1972).

As of July of 1974, there was a nationwide backlog of 50,000 NPDES proposed permit referrals to Interior, with 20,000 additional proposed permits being referred annually from EPA. Practical necessities of funding and management require that Interior be able to choose which if any of those proposed permits warrant comment, so as to utilize its resources with maximum efficiency. *See generally* testimony of Nathaniel P. Reed, Assistant Secretary of the Interior for Fish and Wildlife and Parks, in Hearing before the Subcommittee on Fisheries and Wildlife, Conservation and the Environment of the Committee on the Merchant Marine and Fisheries, House of Representatives, 93rd Cong., 2d Sess., on G.A.O. Report B118370 and H.R. 42, H.R. 2285, H.R. 2288, H.R. 2291, H.R. 2292, H.R. 10651, and H.R. 14527 (June 26, July 1, 2, 11, 1974), pp. 538 *et seq.*

Prohibition of the reasoned exercise of discretion in the allocation of limited resources to the review of a multitude of permits would have a catastrophic effect upon the environmental interests sought to be protected. Any of the permits as to which Interior has issued a "no action" letter would be subject to federal district or appellate court litigation, with resultant delays and expenses. Any person, permittee or otherwise, would have the opportunity retrospectively to invalidate any NPDES permit. In addition, there would be an immediate, total halt to new permit issuance until Interior could effect such revisions in its operating procedure as would be required, after enactment of legislation by Congress to provide additional financial assistance as needed, for substantive comment on every NPDES permit.

Appellants respond that Interior's failure to comment was due, not to its own decision, but to an allocation of funds by the Office of Management and Budget, which prevented Interior from requesting authorization from a willing Congress for appropriation of funds for the addi-

tional manpower necessary to do a proper job on permit referrals. But this response does nothing to undermine the validity of the contention that administrative allocation of resources is required for there to be maximum overall environmental progress, *but see Sierra Club v. Dept. of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975). The decision of the Office of Management and Budget was presumably based, not on an anti-environmental animus, but on the recognition that all the statutory environmental programs of all the agencies cannot be pursued at full capacity at the same time. It has been estimated that the cost of meeting the 1983 effluent limitations requirements of the Water Act alone will be in the order of 100 billion dollars. 6 Environmental Reporter 302-3; *see also* 6 Environmental Reporter, 1129, 1132, 1210 (1975). Clearly, then, there must be difficult choices made as to how money can most effectively be spent. These choices are most properly made by an independent budgetary agency within the Executive Office of the President, rather than by blind competition between the various agencies with programs at stake.

D. An injunction is not warranted.

Appellants seek to have the permit disapproved and the matter remitted to EPA, where a substantive response of Interior to the request for its views would be received and the permit application reconsidered in that light.²³

However, the vacatur of the permit, with the consequence that the private appellants will be required to reapply *ab initio* for a new permit, would do nothing to promote appellants' stated objective of protecting the

²³ Neither the demands of due process nor the letter of the Coordination Act require the Department of the Interior to allow appellants to be heard by it before Interior states its views to EPA.

environment, and might eliminate any possibility for additional consultation and comment by Interior. EPA has, since the date of issuance of the permit at issue herein, approved a New York State Pollution Discharge Elimination System ("NY SPDES") for new permit applications, effective October 28, 1975. — Fed. Reg.²⁴ Thus, if the instant permit is voided, and the private parties are relegated to a new permit application, such application would be to the New York State Department of Environmental Conservation. The Coordination Act by its terms only comes into play when there is federal involvement, as when the actual stream alteration is by a federal agency or is under "Federal permit or license," 16 U.S.C. § 662(a). The EPA approval of the NY SPDES program is not itself such a permit or license, since the essence of a permit or license is specific activity, while a SPDES program is state-wide in applicability. Therefore, if there is a reversal and voiding of the permit at issue, rather than an affirmance or a remand to EPA for specific further action under the permit, no consultation of Interior would be required. See 40 C.F.R. § 124 (1974).

Even if the Court should require that Interior be consulted upon a remand, there would be no reason for EPA to re-open its record unless Interior should have significant negative comments to the permit as it now stands. Only if Interior should recommend some modification, or if appellants should allege "new" grounds for amendment of the permit, would there be reason for the exercise of administrative judgment by EPA, and only in those contingencies could there possibly be any due process requirement that appellants be given a hearing by EPA before a second final decision was reached. Therefore, assuming

²⁴ Publication is imminent.

(but definitely not conceding) that the Coordination Act has not been complied with, the Court should merely direct compliance, and retain jurisdiction pending said compliance, without otherwise reopening the administrative record before EPA. This course of conduct would be far more equitable than the complete reopening of the administrative record, with resultant possibilities of months or even years lost to further administrative proceedings. Such a reversion of the status quo to the situation before the permit was granted would work great hardships to the private appellees; it would also create significant prejudice to EPA's general operation of the NPDES program by the disapproval of a permit on a probably immaterial technicality:

[W]hen the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm, the action must fail notwithstanding allegations falling within the recognized exceptions to sovereign immunity. *State of Washington v. Udall*, [417 F.2d 1310 (9th Cir. 1969)], at 1318 (interpreting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n. 11 (1949)).

Association of N.W. Steelheaders, Inc. v. U.S. Army Corps of Engineers, 485 F.2d 67, 69 (9th Cir. 1973).²⁵ See also *Steubing v. Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975).

Moreover, no notice of appellants' claim under the Coordination Act was received by the Administrator of EPA

²⁵ Inasmuch as the only relief to which appellees could be entitled under any view of the law is a re-consultation, without a voiding of the permit, the alleged failure to consult cannot conceivably rise to the level of a deprivation of due process.

before commencement of this action, as is required by Section 505 of the Water Act, 33 U.S.C. § 1365. This jurisdictional breach of the Water Act's notice requirements, with consequent loss to the agencies involved in the possibility of a "re-consultation" which would have eliminated this issue, is an independent basis for sustaining the denial of an injunction against the federal appellees. Irrespective of whether the Coordination Act otherwise grants jurisdiction, utilization of the notice provision would have allowed an opportunity to minimize damages. Failure to invoke this procedure was a failure to "do equity" which militates against appellants' rights to equitable injunctive relief.

POINT IV

EPA's Actions Have More than Adequately Protected the Environment.

A. The permit protects the environment

Point II of appellants' brief (at pp. 27-30) alleges that the NPDES permit issued to H&H Land Corporation fails to achieve the standards established by Section 302 of the Water Act, 33 U.S.C. § 1312, which appellants claim to be the applicable standard-setting section. By selective reference to language in Section § 302(a) and omission of other language, appellants have conveyed a distorted picture of the applicability of this section of the Act to the permit issued to H&H Land Corporation. In fact, the permit fully complies with Section 301, the applicable section of the Water Act.

Section 301 of the Water Act, 33 U.S.C. § 1311, provides that the achievement of reduction in water pollution will be accomplished through a two-step process. The first step, to be accomplished not later than July 1, 1977,

involves the application of effluent limitations based upon the "best practicable control technology currently available", 33 U.S.C. § 1311(b)(1)(A)(i). The second step, to be achieved by July 1, 1983, involves the application of more demanding effluent limitations based upon the "best available technology economically achievable," 33 U.S.C. § 1311(b)(2)(A)(i).

The effluent limitations contained in the NPDES permit issued to H&H Land Corp. reflect the mandate not of § 301(b)(2) of the Act, (the "1983 standards") as appellants imply, but of § 301(b)(1) (the "1977 standards") as do the effluent limitations required in almost all NPDES permits issued by EPA. The permit is effective until July 11, 1979 (1a, 16a); any superseding permit issued hereafter which is effective through July 1, 1983 or later will require adherence to the more strict effluent limitations of Section 301(b)(2).

Independently of the requirements of Sections 301(b)(1) and (2), Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), mandates imposition of whatever effluent limitations are required to achieve such state water quality standards as are more stringent than EPA's own 1977 standards. The H&H permit fully complies with this subsection by incorporating the effluent limitations required to meet New York State's water quality standards for intermittent streams, its most stringent standards.²⁶ (See A20-A21)

²⁶ As noted in the Statement of Facts, *supra*, an intermittent stream is one in which there may be no water flowing at certain periods. Thus, the state standards applicable herein presume that at times H&H's effluent may be the only fluid in the streambed. The standards are correspondingly strict, to take account of this lack of dilution. However, it is by no means clear that Brown Brook will ever fail to provide water for dilution of any effluent into it. This is thus an extra precaution, a "fail-safe," for the protection of the environment.

Section 302, 33 U.S.C. § 1312, relied upon by appellants, is inapplicable to the permit at issue. This section provides for the adoption by EPA of water quality related effluent limitations, independent of limitations adopted pursuant to Section 301 and the sections to which it makes reference. However, it applies only in connection with attainment of 1983 goals. In fact, no water quality related effluent limitations have been adopted for Brown Brook. Section 302 itself makes reference solely to Section 301(b) (2); in addition, Section 101(a) (2), 33 U.S.C. § 1251(a) (2), which establishes the water quality goal which Section 302 is intended to implement, specifically states that the particular goal is to be achieved by 1983. Thus, Section 302 provides that the national goal of a particular water quality must be achieved no later than July 1, 1983, upon the application of the best available technology economically achievable, and then only if

the application of effluent limitations required under section 301(b) (2) of this Act, would interfere with the attainment or maintenance of that water quality . . . (*Id.*).

Application to the permit issued to H&H Land Corporation of effluent limitations established elsewhere, as if they were Section 301 limitations, and were presently applicable, would pervert the intent of the Act and erode the incremental, dual-phased process for pollution abatement so carefully constructed by the Act's draftsmen.

Analysis of the provisions of the H&H permit in light of this explication of the applicable law leads to the conclusion that the permit fully comports with the requirements of both the "best practicable control technology" and New York State's water quality standards for intermittent streams. It should be noted in this regard that, while we believe that it is clear from a review of the

terms of the permit that it comports with all legal requirements, this Court's scope of review is narrow:

[We] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), quoted in *Union Electric Co. v. EPA*, *supra*, 515 F.2d at 214.

The 1977 standards for publicly-owned sewage treatment works require what "secondary treatment";²⁷ Section 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B), (1972). Because the waste characteristics to be treated by the H&H Land Corp. facility resemble those treated by publicly owned treatment works, the regulations require that effluent limitations reflective of secondary treatment be incorporated into NPDES permits such as the present permit. In addition, the New York State Department of Environmental Conservation certification received on this permit (A20) ensured that the discharge would comply with State water quality standards, wherever these were more stringent than federal standards.

The particular restrictions of the H&H permit have already been described in the statement of facts, and do not need repeating.

As New York State stated in reply to Kipp's May 20, 1974 letter:

²⁷ Secondary treatment is defined at 38 Fed. Reg. 22298 (Aug. 17, 1973).

In most instances, the effluent from a treatment plant designed to these standards is actually cleaner than the natural water into which it is being discharged (A22).

B. There has been no actionable violation of EPA's wetlands regulations

Appellants have also alleged that EPA has failed to follow its established policy of protecting wetlands. Presumably, the theory of this claim is that appellants are entitled to sue as "private attorneys general" or to enforce the execution of a nondiscretionary duty. This claim must fail because the duty involved is (1) discretionary and (2) has been carried out; and to the extent that it has not, (3) a duty imposed by regulations must bow to an inconsistent duty imposed by statute.

It is uncontested that it is established EPA policy to preserve wetlands ecosystems wherever possible. But a general statement of policy does not mandate a specific course of conduct in a particular situation the facts of which are not addressed in the policy statement. Thus, the general concern with wetlands must be harmonized with the statutory requirements under the NPDES program. To hold that an agency-produced policy could negate the carefully-constructed two-tier control system would be to vitiate the Congress' legislative supremacy. Furthermore, the record demonstrates that EPA did all that was required of it in its evaluation of the circumstances surrounding the H&H permit application and in the drafting of that permit. The performance of this duty constituted effectuation of the general pro-wetlands policy as well. Plaintiffs must be restricted to challenging the effectuation of the pro-wetlands policy only in the specific case of the H&H permit, which is the only instance in which they have an interest, and therefore standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

CONCLUSION

The petition should be dismissed, and the dismissal of the District Court action against the federal appellees affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
*United States Attorney,
Southern District of New York,
Attorneys for the Federal
Defendants.*

WILLIAM ROCHE BRONNER,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,

RICHARD G. TISCH,
*Attorney, Region II, EPA,
Of Counsel.*

APPENDIX



1a

Permit No.: NY 0026891

Name of Permittee: H & H Land

Corporation-Heritage Hills of Westchester

Effective Date: July 12, 1974

Expiration Date: July 11, 1979

**NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM
PERMIT TO DISCHARGE**

In reference to the application received from the above-mentioned permittee for a permit authorizing the discharge of pollutants in compliance with the provisions of the Federal Water Pollution Control Act, as amended by the Federal Water Pollution Control Act Amendments of 1972, P. L. 92-500, October 18, 1972 (33 U.S.C. §§ 1251-1376) (hereinafter referred to as "the Act"),

H & H Land Corporation—
Heritage Hills of Westchester
Route 100
Somers, New York 10589

(hereinafter referred to as "the Permittee")

is authorized by the Regional Administrator, Region II, U.S. Environmental Protection Agency, to discharge from:

the H & H Land Corporation—Heritage Hills of West-

chester S.T.P. off Warren Street, Somers, New York,

to receiving waters named Brown Brook in accordance

with the following conditions.

A. GENERAL CONDITIONS

1. All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant more frequently than, or at a level in excess of, that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit. Such a violation may result in the imposition of civil and/or criminal penalties as provided for in Section 309 of the Act. Facility modifications, additions, and/or expansions that increase the plant capacity must be reported to the permitting authority and this permit then modified or re-issued to reflect such changes. Any anticipated change in the facility discharge, including any new significant industrial discharge or significant changes in the quantity or quality of existing industrial discharges to the treatment system that will result in new or increased discharges of pollutants must be reported to the Regional Administrator. Modifications to the permit may then be made to reflect any necessary changes in permit conditions, including any necessary effluent limitations for any pollutants not identified and limited herein. In no case are any new connections, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limitations specified herein.
2. After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:
 - a. violation of any terms or conditions of this permit;

- b. obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or,
 - c. a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
3. Notwithstanding 2 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition and the permittee shall be so notified.
4. The permittee shall allow the head of the State water pollution control agency, the Regional Administrator, and/or their authorized representatives, upon the presentation of credentials:
 - a. to enter upon the permittee's premises where an effluent is located or in which any records are required to be kept under the terms and conditions of this permit;
 - b. to have access to and copy at reasonable times any records required to be kept under the terms and conditions of this permit;
 - c. to inspect at reasonable times any monitoring equipment or monitoring method required in this permit; or,
 - d. to sample at reasonable times any discharge of pollutants,
 - e. to inspect the operation of the treatment facilities.

5. The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, state, or local laws or regulations; nor does it obviate the necessity of obtaining State or local assent required by law for the discharge authorized.
6. This permit does not authorize or approve the construction of any onshore or offshore physical structures of facilities or the undertaking of any work in any navigable waters.
7. Except for data determined to be confidential under Section 308 of the Act, all monitoring reports required by this permit shall be available for public inspection at the offices of the head of the State water pollution control agency and the Regional Administrator. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Act.
8. The diversion or bypass of any discharge from the treatment works by the permittee is prohibited, except: (1) where unavoidable to prevent loss of life or severe property damage; or (2) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the terms and conditions of this permit. The permittee shall notify the Regional Administrator in writing within 72 hours of each diversion or bypass in accordance with the procedure specified below for reporting non-compliance. The permittee shall within 30 days after such incident submit to EPA for approval a plan to prevent recurrence of such incidents.

9. If for any reason the permittee does not comply with or will be unable to comply with any effluent limitation specified in this permit, or should any unusual or extraordinary discharge of wastes occur from the facilities herein permitted, the permittee shall immediately notify the Regional Administrator and appropriate State agency by telephone and provide the same authorities with the following information in writing within five days of such notification:
 - a. A description of the non-complying discharge including its impact upon the receiving waters.
 - b. Cause of non-compliance.
 - c. Anticipated time the condition of non-compliance is expected to continue, or if such condition has been corrected, the duration of the period of non-compliance.
 - d. Steps taken by the permittee to reduce and eliminate the non-complying discharge.
 - e. Steps to be taken by the permittee to prevent recurrence of the condition of non-compliance.
10. Permittee shall take all reasonable steps to minimize any adverse impact to navigable waters resulting from non-compliance with any effluent limitation specified in this permit. The permittee will also provide accelerated or additional monitoring as necessary to determine the nature and impact of the non-complying discharge.
11. Except as provided in permit condition 8 on bypassing, nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for non-compliance, whether or not such non-compliance is due to factors beyond his control, such as equipment breakdown, electric power failure, accident, or natural disaster.

12. Nothing in this permit shall be construed to preclude the institution of any legal action nor relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Act.
13. In the event of any change in control or ownership of facilities from which the authorized discharges emanate, the permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the Regional Administrator and the State water pollution control agency.
14. The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.
15. The permittee shall provide notice to the Regional Administrator of the following:
 - a. Any new introduction of pollutants into such treatment works from a source which would be a new source as defined in section 306 of the Act if such source were discharging pollutants;
 - b. Any new introduction of pollutants which exceeds 10,000 gallons on any 1 day into such treatment works from a source which would be subject to section 301 of the Act if such source were discharging pollutants; and,
 - c. Any substantial change in volume or character of pollutants being introduced into such treatment works by a source introducing pollutants

into such works at the time of issuance of the permit.

Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works; and an anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works.

16. The permittee shall require any industrial user of such treatment works to comply with the requirements of section 204(b), 307, and 308 of the Act. Any industrial user subject to the requirements of section 307 of the Act shall be required by the permittee to prepare and transmit to the Regional Administrator periodic notice (over intervals not to exceed 9 months) of progress toward full compliance with section 307 requirements.
17. The permittee shall require any industrial user of storm sewers to comply with the requirement of section 308 of the Act.
18. The United States Army Corps of Engineers conducts maintenance dredging of navigable waters and their tributaries pursuant to certain federal statutes. The permittee should be aware of its possible responsibilities under the maintenance dredging program. Under these laws, any person, firm or other entity discharging suspended solids into a navigable waterway of the United States, or tributary thereof, which contribute to the necessity for maintenance dredging of that waterway may be required to participate in the maintenance dredging program.

TABLE I

EFFLUENT LIMITATIONS

CHARACTERISTICS		lb/day	k/gday	mg/l	* Minimum Percent Removal Limitations	
					*	*
BOD ₅	daily arithmetic mean	29.0	13.0	5.0	85%	
Suspended Solids	daily arithmetic mean	29.0	13.0	5.0	85%	
Dissolved Oxygen	minimum daily arithmetic mean	—	—	7.0	N/A	
NH ₃ —(N)	daily arithmetic mean	12.0	5.5	2.0	N/A	
Phosphorous	daily arithmetic mean	3.0	—	0.5	N/A	
Residual Chlorine	minimum daily arithmetic mean		—	0.5	N/A	
Settleable Solids	daily arithmetic mean 0.1ml/l					

* Whichever is more stringent

2. Facility Operation and Quality Control

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

- a. At all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants.
- b. The permittee shall provide an adequate operating staff which is duly qualified to carry out the operation, maintenance and testing functions required to insure compliance with the conditions of this permit.
- c. Maintenance of treatment facilities that results in degradation of effluent quality shall be scheduled during non-critical water quality periods and shall be carried out in a manner approved by the permitting authority.
- d. Under no circumstances shall the permittee allow introduction of the following wastes into the waste treatment system:
 - aa. Wastes which create a fire or explosion hazard in the treatment works.
 - bb. Wastes which will cause corrosive structural damage to treatment works.
 - cc. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works.
 - dd. Wastewaters at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so as to cause a loss of treatment efficiency.

3. *Self-Monitoring and Reporting Requirements*

a. The permittee shall effectively monitor the operation and efficiency of all treatment and control facilities and the quantity and quality of the treated discharge. Monitoring data required by this permit shall be summarized on an average calendar month basis. Individual reports are to be submitted on a *quarterly* basis. Duplicate original copies of the discharge monitoring report form (EPA Form 3320-1), properly completed and signed by the permittee must be submitted within 28 days after the treatment report period to the Regional Administrator and the State Agency at the following addresses:

U.S. Environmental Protection Agency
Region II
Permits Administration Branch
26 Federal Plaza
New York, New York 10007

Chief, SPDES Permits Section
Division of Pure Waters
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12201

Quarterly reports will be required for periods beginning on August 1, 1974. The data collected and submitted shall include the following parameters and testing frequencies:

See Table II

Samples and measurements of the effluent taken to achieve compliance with the monitoring requirements specified above shall be taken at the point of combined flow into the outfall sewer.

b. *Sampling and Analysis Methods*

Other measurements of oxygen demand can be substituted for Bio-chemical Oxygen Demand (BOD) where the permittee can demonstrate long-term correlation of the method with BOD values. Substitution of such measurements must receive prior approval of the permitting authority.

The analytical and sampling methods used shall conform to the latest edition of the reference methods listed below. (These are interim references to be replaced by Sec. 304(g) guidelines when available). However, different but equivalent methods are allowable if they receive the prior written approval of the permitting authority.

TABLE II—SELF-MONITORING REQUIREMENTS¹

Parameter	Minimum Monitoring Requirements	
	Measurement Frequency	Sample Type
Total Flow, mgd	Continuous	N/A
BOD ₅ , mg/l	Once per-week	6-hour composite
BOD ₅ , lbs/day	—	—
Settleable Solids, ml/l	daily	grab
Suspended Solids, mg/l	Once per-week	6-hour composite
Suspended Solids, lbs/day	—	—
Residual Chlorine, mg/l ²	daily	grab
Fecal Coliform, N per 100 ml ²	Once per-week	grab
pH	daily	grab
Temperature, °C ²	daily	grab
D.O., mg/l ²	Once per-week	grab
NH ₃ —(N), mg/l ²	Once per-week	grab
Phosphorus, mg/l	Once per-week	6-hour composite

¹ Except where indicated, influent and effluent measurement and testing are required.

² Only effluent testing required.

* To be determined based on actual flow and actual testing results for parameters notes.

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1. *Standard Methods for the Examination of Water and Wastewaters*, 13th edition, 1971, American Public Health Association, New York, New York 10019.
2. *A.S.T.M. Standards, Part 23, Water; Atmospheric Analysis*, 1972, American Society for Testing and Materials, Philadelphia, Pa. 19103.
3. *Methods for Chemical Analysis of Water and Wastes*, April 1971, Environmental Protection Agency, Water Quality Office, Analytical Quality Control Laboratory, 1014 Broadway, Cincinnati, Ohio 45202.

The permittee shall periodically calibrate and perform maintenance procedures on all monitoring and analytical instrumentation at intervals to insure accuracy of measurements.

4. *Recording*

The permittee shall record all samples for the date and time of sampling, the sampling method used, the date analyses were performed, the identity of the analysts, and the results of all required analyses and measurements.

All sampling and analytical records mentioned in the preceding paragraph shall be retained for a minimum of three years. The permittee shall also retain all original recordings from any continuous monitoring instrumentation, and any calibration and maintenance records, for a minimum of three years. These periods will be extended during the course of any unresolved litigation, or when so requested by the Regional Administrator.

5. *Solids Disposal*

Collected screenings, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into navigable waters or their tributaries.

6. Additional laboratory equipment and testing, as may be required from time to time by the New York State Department of Environmental Conservation, be supplied and performed.
7. Summary reports of the operation of the treatment works including laboratory tests and measurements of the influent, unit effluents and plant effluent and results therefrom as required by the New York State Department of Environmental Conservation shall be submitted monthly on forms furnished by or satisfactory to the Department. In addition, operating records shall be kept at the treatment works.
8. Sufficient personnel meeting qualifications for operators of sewage treatment works as required under Title 6 of the Official Compilations of Codes, Rules and Regulations of the State of New York (6NYCRR 650) shall be employed to satisfactorily operate and maintain the treatment facilities.
9. No sewage shall be discharged until such time as the proposed treatment facility is operational.

SECTION C —

“Special Conditions”

C. *Schedule of Compliance for Construction*

1. The permittee has indicated that neither the treatment facility nor the wastewater collection system are operational at present. Therefore, the permittee shall notify the Regional Administrator and/or the State Agency within 14 days following the completion of each¹ of the following phases.
 - a.) State certification of the plans and specifications for the collection system and the Sewerage Treatment Plant.
 - b.) Commencement of Construction of both the collection system and the treatment facility.
 - c.) Completion of both the collection system and the treatment facility.
 - d.) Operation of the treatment facility.

¹ Each notice of non-compliance shall include the following information:

- A. A short description of the non-compliance;
- B. A description of any actions taken or proposed by the permittee to comply with the elapsed schedule requirement without further delay;
- C. A description of any factors which tend to explain or mitigate the non-compliance; and
- D. An estimate of the date the permittee will comply with the elapsed schedule requirement and an assessment of the probability that permittee will meet the next schedule requirement on time.

2. The treatment facility shall be in compliance with the effluent limitations indicated in condition B(1) within 3 months of the date the facility becomes operational.
3. The permittee shall submit by October 12, 1974, an Engineering Report describing in detail the method with which the permittee proposes to meet all effluent limitations required in the permit. Upon receipt of this information, the permit may be revised.

This permit shall become effective on July 12, 1974.

This permit and the authorization to discharge shall be binding upon the permittee and any successors in interest of the permittee and shall expire at midnight on July 11, 1979. The permittee shall not discharge after the above date of expiration. In order to receive authorization to discharge beyond the above date of expiration, the permittee shall submit such information, forms, and fees as are required by the agency authorized to issue NPDES permits no later than 180 days prior to the above date of expiration.

By authority of GERALD M. HANSLER, P.E.
(Regional Administrator)

Date: July 9, 1974

Richard A. Flye
(Signature)

RICHARD A. FLYE
Chief

Water Enforcement Branch
Enforcement and Regional
Counsel Division

Affidavit of William J. Muszynski

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SUN ENTERPRISES, LTD., et al.,

Plaintiffs,

—v.—

RUSSELL TRAIN, et al.,

Defendants.

State of New York,
County of New York, ss.:

WILLIAM J. MUSZYNSKI, being duly sworn, deposes and says:

1. I am employed as a Supervisory Sanitary Engineer by the United States Environmental Protection Agency ("EPA") in its Facilities Technology Division. I received my Masters of Science in Civil Engineering degree with a major in sanitary engineering, from Newark College of Engineering in June, 1972. As Chief of the Municipal Permits Section of EPA, it is my responsibility to ensure that National Pollutant Discharge Elimination System ("NPDES") permits are developed in accordance with the Federal Water Pollution Control Act Amendments of 1972 ("the Act"). In connection with the NPDES permit applied for on or about December 27, 1973 and issued on July 12, 1974 to H & H Land Corporation ("H & H"), I am familiar with the facts surrounding issuance of the permit.

2. A discharge permit such as the H & H permit is prepared in close consultation with Federal, State and other regulatory agencies. This procedure is mandated by the Act and regulations promulgated thereunder 33 U.S.C. 1311-1342 (1972). Effluent limitations in NPDES permits are developed from applicable federal and state water quality requirements. In all cases, the more stringent limitations for each parameter in a permit are incorporated in the permit.

3. Unlike most NPDES permits issued for sewage treatment plants, the H & H permit was issued in connection with a newly designed and constructed facility. Under the Act, sewage treatment plants of the H & H type are required to meet only secondary treatment in order to satisfy federal standards. However, because of the interrelationship of federal and state standards, the H & H plant will have to satisfy standards far beyond the secondary treatment limitations.

4. In accordance with EPA procedure, upon receipt of H & H's application, my office proceeded to draft a proposed permit. This permit was circulated to the New York State Department of Environmental Conservation ("DEC") for its consideration, i.e., a request for certification of the proposed discharge was sent to the DEC. (See Item 2 of the Tisch Affidavit). DEC, by letter dated April 5, 1974, issued an intent to certify that the permit, with certain additions, would satisfy all applicable New York State water quality standards for intermittent streams. These limitations, including effluent restrictions and sampling and monitoring requirements, were eventually incorporated into the permit.

5. Brown Brook, the receiving stream of the H & H discharge, has been classified by DEC as an intermittent stream. Intermittent streams are streams which may, at some time during the year, exhibit no flow. At these

times, the only flow in the stream would be the effluent from the treatment facility. The DEC standards utilized herein are among the most stringent stream standards in New York State. In addition, DEC established limitations on the quantity of phosphorus and suspended solids discharged and on the effluent and in-stream chlorine residuals. These standards provide that effluent quality from such discharges shall approach the quality of the receiving water.

6. EPA also sent copies of the H & H draft permit to the U. S. Army Corps of Engineers and Department of the Interior to solicit any comments on the proposed discharge. At this time, public notice of the completed application from H & H and of the draft permit was published in the Peekskill Star (See Item 7 of the Tisch Affidavit). All interested persons were invited to comment on the draft permit and to request, if desired, either a public or adjudicatory hearing on the proposed discharge. No request for a hearing was received.

7. Approximately 30 days thereafter, a letter was received from plaintiff Lyman Kipp, on Sun Enterprises, Ltd., stationery. The letter (Exhibit 8 to the Tisch Affidavit) does not state whether its comments are addressed to the proposed permit or merely to the situation in general. After some intra-agency discussion, it was determined not to respond to that letter, and the letter was considered as a comment upon the proposed permit.

8. I am advised that a memorandum of law is to be submitted herewith which will analyze the legal consequences of the above facts in light of the claims made in the present action.

9. One of the requirements of the H & H permit is that no less than 0.5 milligrams per liter (mg/l) chlorine be present in the effluent. Due to an error in transcribing,

this requirement as found in the permit insufficiently restates the requirement as certified by DEC. It is this 0.5 mg/l figure which is mentioned in the Cardenas Affidavit. In order to conform with the intent of the DEC certification as detailed in its letter of April 10, 1974, the permit will be revised to read: "The concentration of residual chlorine, during the disinfection period, shall be five-tenths milligram per liter (0.5 mg/l) or greater after a minimum of 15 minutes contact time, . . ." (See Exhibit 6 in the Tisch Affidavit). It is the intent of this requirement to insure sufficient disinfection. In addition, as required to meet the federal definition of secondary treatment, the permit contains an effluent limitation on the allowable level of fecal coliform bacteria present in the effluent.

10. There are, however, other limitations in the permit, whose purpose is to reduce or eliminate the possible danger to fish posed by the chlorine. These require that no *more* than 0.05 mg/l of chlorine be present in the stream in the immediate vicinity of the discharge, and that no more than 0.03 mg/l of chloramine (a chlorine derivative) be present in the stream after reasonable mixing. As a practical matter, since the stream is classified intermittent, with the possibility of no stream flow being available for mixing, the treatment plant will have to provide for dechlorination of its effluent prior to discharge into Brown Brook to satisfy all standards.

11. It is the responsibility of EPA to develop NPDES permits with effluent limitations, sampling and monitoring provisions and other terms and conditions consistent with the Act. It is also the responsibility of EPA to insure that the terms and conditions of the NPDES permit are met by the permittee. It is the responsibility of the permittee to provide treatment facilities which will achieve an effluent quality which will comply with the NPDES permit. The NPDES discharge permit issued to H & H

Land on July 12, 1974 is consistent with these requirements of the Act.

/s/ WILLIAM J. MUSZYNSKI
WILLIAM J. MUSZYNSKI

Sworn to before me this
14th day of February, 1975

COLES H. PHINIZY, JR.
Notary Public

COLES H. PHINIZY, JR.
Notary Public, State of New York
No. 31-3094050
Qualified in New York County
Commission Expires April 30, 1975

★ U. S. Government Printing Office 1975—614—350—108

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-6068

State of New York) ss
County of New York)

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 21st day of

November 1975 she served a copy of the within
govt's brief

by placing the same in a properly postpaid franked envelope
addressed:

- 1) Blasi & Zimmerman, Esqs., 360 So. Bway, Tarrytown, NY 10591 (1 cy)
- 2) O Harper LeCompte, Asst. Atty Gen. Water Resources Bureau NY State
Atty General's Office The State Campus, Albany, NY (1 cy)
- 3) Chambers & Chambers, Esqs., 60 East 42nd St. NY NY (1 cy)
- 4) Marshall, Bratter, Greene, Allison & Tucker, Esqs., 430 Park Ave. NY
NY 10022 (2) copies)
- 5) Anderson, Russell, Kill & Olick, Esqs., 630 Fifth Ave. NY NY 10020
(2 copies)

And deponent further says
she sealed the said envelope s and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

21st day of November 19 75

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977